Supreme Court, U.S.
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No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK BACHNER,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. PETITIONER WAS ENTITLED TO DISMISSAL ON CONSTITUTIONAL AND STATUTORY SPEEDY TRIAL CLAIMS WHEN HE HAD BEEN INCARCERATED FOR 23 MONTHS, HAD ASSERTED HIS SPEEDY TRIAL CLAIMS, DELAY WAS SOLELY ATTRIBUTABLE TO THE GOVERNMENT, AND PETITIONER SUFFERED PREJUDICE TO HIS DEFENSE.

II. WHEN THE ELEVENTH CIRCUIT FOUND THAT ANTAGONISTIC DEFENSES EXISTED, COMPELLING PREJUDICE ALSO EXISTED REQUIRING REVERSAL OF PETITIONER'S CONVICTION.

III. THE COURT ERRED IN FAILING TO CONDUCT A HEARING ON PETITIONER'S MOTIONS TO SUPPRESS, AND MISAPPLIED THE *LEON* GOOD FAITH EXCEPTION TO A *FRANKS v DELAWARE* MOTION.

IV. THE ELEVENTH CIRCUIT ERRED IN DETERMINING THAT PETITIONER'S CLAIMS OF REVERSIBLE CUMULATIVE ERROR WERE WITHOUT MERIT.

PARTIES TO THE PROCEEDINGS

The parties before this Court are the United States of America and the Petitioner, Frank Edward Bachner. Edward Staffire, Co-Appellant before the Eleventh Circuit, has not filed a Petition for a Writ of Certiorari in this matter.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is a Non-Published opinion reported as *United States of America v. Edward Staffire* at 946 F.2d 1546 (11th Cir. 1991), and is reproduced in the Appendix at A-1-A-36. The Order denying Petitioner's Petition for Re-Hearing and Suggestion for Rehearing En Banc was entered by the Eleventh Circuit on December 26, 1991.

The Judgment and Commitment Order of the United States District Court, Southern District of Florida, convicting Bachner and sentencing him was entered on July 7, 1989.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the

Eleventh Circuit was rendered on September 24, 1991. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 26, 1991 (A 37-39). The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. Section 1254, and Supreme Court Rules 10.1(a) and (c) and Rule 13. This Petition is timely filed under extensions permitted by Justice Kennedy.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes controlling the disposition of this case are lengthy. *See,* Amendments V, VI and VIII of the Constitution of the United States; Title 18 U.S.C. Section 3161 (h)(8), and Federal Rule of Evidence 609. The pertinent text of each will be reproduced in the Appendix.(A40-44).

STATEMENT OF THE CASE

Frank Edward Bachner, the Petitioner, seeks this extraordinary relief from the judgment of the United States Court of Appeals for the Eleventh Circuit affirming a judgment and conviction wherein he was sentenced to life in prison without possibility of parole, a concurrent 110 years in prison and a 2.75 million dollar fine, as well as forfeiture of numerous assets, after a jury trial held before Southern District of Florida Judge Norman C. Roettger. Petitioner directly appealed his criminal conviction and sentence.[1] Jurisdiction was conferred by Title 28,

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[1] Petitioner also appealed a related Habeas Corpus Petition alleging violations of his Fifth, Sixth and Eighth Amendment rights to the United States Constitution, as well as violation of his statutory speedy trial rights due to his prolonged Pre-trial incarceration. The Habeas Corpus appeal was consolidated for oral argument before the Eleventh Circuit and was denied April 17, 1991. No further appeal was taken.

U.S.C. Section 1291 and Title 18, U.S.C. Section 3742.

Petitioner, and three others, were named in various counts of a 24 count, four time superseded indictment accusing Petitioner of managing or supervising a continuing criminal enterprise, participating in various conspiracies to import and distribute cocaine, possession of a Drug Enforcement Agency report, attempting to manufacture cocaine outside the country, and tax evasion.[2]

In the interest of brevity and judicial economy, Petitioner would incorporate by reference the facts stated in the non-published opinion of the Eleventh Circuit Court of Appeals, reproduced in the Appendix. Petitioner

[2] The so called tax counts (Counts 20-24 of the indictment) were severed by the District Court. Petitioner filed a Motion to Dismiss these charges on August 17, 1989. The Motion has not been ruled on, and the charges are still pending.

will include in the argument portion of this Petition those facts which directly relate to the issues raised and are necessary to a full and fair review at this stage of the proceedings.

Prior to trial, Petitioner filed two lengthy Motions to Suppress Evidence seized from his residence alleging *Franks v. Delaware* issues, an overbroad search, lack of probable cause, use of unreliable and uncorroborated informants and staleness. Both motions were consolidated at the request of Petitioner and denied without hearing due to the Court's misapplication of the "good faith" standard enunciated by this Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984).

Petitioner filed numerous other pretrial motions including a motion to dismiss on Constitutional and statutory speedy trial grounds, a motion to dismiss

due to the Government's destruction of evidence contained on Petitioner's computer which was seized pursuant to a search warrant, a Motion for Bill of Particulars, an Emergency Motion for Habeas Corpus, Motions to Terminate Pre-Trial Detention and Motions for Severance. All were denied by the District Court.

Petitioner was tried before a jury. After the government rested it's case, and at the close of all the evidence, Petitioner moved orally and in writing for a Judgment of Acquittal. All motions were denied.[3] Thereafter, the jury convicted Petitioner on all remaining counts.

On April 26, 1989, the District Court sentenced Petitioner to serve life in prison, without possibility of parole, a concurrent 110 years, and a 2.75 million

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[3] The Government dismissed three Counts against Petitioner at the close of it's case due to insufficient evidence, when a critical witness refused to testify.

dollar fine. Petitioner timely appealed to the Eleventh Circuit Court of Appeals.

On September 24, 1991, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction and sentence of Petitioner. On December 26, 1991, the Appellate Court entered it's Final Order and Judgment, denying all Petitions for Rehearing and Suggestion for Rehearing En Banc. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS ENTITLED TO DISMISSAL ON CONSTITUTIONAL AND STATUTORY SPEEDY TRIAL CLAIMS WHEN HE HAD BEEN INCARCERATED FOR 23 MONTHS, HAD ASSERTED HIS SPEEDY TRIAL CLAIMS, DELAY WAS SOLELY ATTRIBUTABLE TO THE GOVERNMENT, AND PETITIONER SUFFERED PREJUDICE TO HIS DEFENSE.

On March 18, 1987, Petitioner, along with three co-defendants, was arrested based upon a six (6) count indictment returned by the grand jury the previous

day, alleging importation and conspiracy to import cocaine.

At the government's request, Petitioner and two co-defendants were ordered pre-trial detained on March 24, 1987.

Petitioner's trial was originally scheduled for June 6, 1987. However, on June 3, 1987, the government, along with co-defendant Edward Staffire filed a joint Motion for Continuance requesting a thirty (30) day delay, since discovery had not been provided.

On June 10, 1987, the District Court entered an Order continuing the case until March 21, 1988 based upon the "ends of justice" provisions of 18 U.S.C. 3161(h)(8). In the Order, the District Court excluded all time between entry of the Court's Order and the time of trial, eliminating Bachner's statutory speedy

trial rights when Bachner had neither sought, nor wanted, delay.

After the June 10, 1987 continuance, Petitioner remained incarcerated while the trial date was reset five (5) times, and the indictment superseded four (4) times. Petitioner objected to each continuance, and sought severance from his co-defendant, Douglas Donahue, whose court appointed attorney was unavailable for trial. [4] At the government's request, the District Court refused to sever the trial, and denied Petitioner's request for pre-trial release.

On October 21, 1988, Petitioner filed an Emergency Motion for Habeas Corpus based upon violations of his Fifth, Sixth and Eighth Amendment rights to the United

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[4] Douglas Donahue's attorney, Charles White, was involved in the Outlaw's motorcycle gang trial which lasted for some 15 months. The entire period of that trial was after Petitioner's arrest, and prior to trial.

States Constitution, as well as his statutory speedy trial rights pursuant to 18 U.S.C. Section 3161, *et. seq.* The District Court denied Petitioner's motion of November 28, 1988. [5]

Prior to trial, Petitioner moved to dismiss the indictment based upon violations of his constitution and statutory speedy trial rights, due to his pre-trial incarceration for 23 months, the Court approved government request for delay of his trial, his assertion of his speedy trial rights, and the resultant prejudice to Petitioner and his defense. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

In *Barker, supra*, this Court set a four-part balancing test for evaluating constitutional speedy trial claims. The

[5] The Habeas Corpus ruling was timely appealed, and consolidated for oral argument before the Eleventh Circuit. The District Court's decision was affirmed on April 13, 1991.

factors to be weighed are: length of delay, reason for delay, the Defendant's assertion of the right; and prejudice to the Defendant. Under the *Barker* test, the length of delay must be presumptively prejudicial in order to trigger an inquiry into the other three factors. The Defendant does not have to show actual prejudice if the first three factors are heavily weighted against the government. *United States v. Doggett*, 906 F.2d 573 (11th Cir. 1990.)[6]

An examination of the four *Barker* factors reveals that the District Court erred in denying Petitioner's motion, and the Eleventh Circuit was incorrect in determining the claim to be without merit.

LENGTH OF DELAY

Defendant was incarcerated for nearly twenty three (23) months prior to trial.

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[6] Doggett is currently before this Court in case No. 90-857 having been restored to the calendar for reargument.

In *Ringstaff v. Howard*, 885 F.2d 1542 (11th Cir. 1989), the Court held that a delay of 23 months was sufficient to trigger an inquiry into the other *Barker* factors. The government has previously conceded that 23 months delay requires consideration of the remaining *Barker* factors.

REASON FOR DELAY

Courts have recognized three classes of delay in bringing a Defendant to trial. *Turner v. Estelle*, 515 F.2d 853 (5th Cir. 1975). Those classes are deliberate, negligent and justified delay, with a certain weight to be attributed to each class.

In order to be weighed heavily against the government, the trial delay must result from bad faith or dilatory purpose by the government. *Ringstaff*, 805 F.2d at 1544. Bad faith encompasses a deliberate effort to prejudice or harass

the Defendant, while a dilatory purpose will include efforts made by the government to gain a tactical advantage over the accused. *United States v. Loud Hawk*, 474 U.S. 302, 106 S.Ct. 648, 88 L. Ed. 2d 640 (1986).

Petitioner contends that the reasons for delay should be heavily weighted against the government because it continually superseded the indictment, delayed discovery, asked for continuances so that a preferred prosecutor could try the case,[7] and opposed severing a co-defendant for over a year to keep this case from being tried in a timely fashion. Additionally, the government at various status conferences before the District Court, informed the Court that the case

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[7] Lead Assistant United States Attorney Gregory Kehoe was also the lead prosecutor for the 15 month Outlaws motorcycle gang trial mentioned in footnote 4.

would take two months to try, was exceptionally complex, and that the lead prosecutor had to try the case.[8]

If forum shopping has been determined to be deliberate delay, *United States v. Lara,* 520 F.2d 460 (5th Cir. 1975), delay so that a preferred prosecutor can try the case, coupled with a 15 month delay so

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[8] Unfortunately, none of what the Government claimed proved to be true. The case took only 11 days to try (8 1/2 for the Government), and was hardly complex, a fact acknowledged by the prosecution before the District Court. The government called forty-five witnesses, over half being documentary or exhibit witnesses who testified for less than ten (10) minutes. Most damaging to the Government's position in this facet of the *Barker* analysis was that lead attorney Kehoe left the office prior to trial. He was capably replaced by Assistant United States Attorney Tom Blair less than three weeks prior to trial. Blair presented a thorough, professional prosecution and was hardly at a disadvantage.

The Government's representations as to the length of co-defendant Donahue's trial were also greatly exaggerated. The government claimed that severing Donahue would not shorten the trial, however, testimony against Donahue consisted of one main evidentiary witness, and three documentary or exhibit witnesses.

that a court appointed attorney for a co-defendant can finish a lengthy trial while Petitioner remained incarcerated, and such delay is requested by the government, should also support Defendant's claim of deliberate delay.

ASSERTION OF SPEEDY TRIAL RIGHT

Petitioner's efforts to obtain a Defendant's speedy disposition of his case is well supported by the record. Petitioner moved to be accorded priority, moved for severance at each status conference, joined in motions for severance by co-defendant Donahue, moved to terminate pre-trial detention, and filed a petition for Habeas Corpus raising speedy trial claims. This factor clearly should be weighted heavily against the government.

PREJUDICE

A defendant does not have to show actual prejudice if the first three *Barker*

factors weigh heavily against the government. *Ringstaff, supra*, at 1542, *United States v. Dennard*, 722 F.2d. 1510 (11th Cir. 1984). Petitioner contends that no prejudice need be shown in this case, since the first three factors weigh heavily against the government.

However, Petitioner has previously demonstrated prejudice in this case as defined by this court in *Barker*.

The *Barker* court identified three types of prejudice resulting from a prolonged trial date: (i), oppressive pretrial incarceration; (ii), anxiety and concern of the accused; and, (iii), possible impairment of the defense. *Barker*, 92 S. Ct. at 2193. While it has been stated that only the last type of prejudice poses the threat of affecting the fairness and reliability of the defendant's trial; all three are protected by the speedy trial guarantee. *United*

States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971).

Certainly, Petitioner's lengthy 23 months pre-trial incarceration, financial loss, loss of contact with his family, and physical and mental hardship, meets the first two prejudice considerations.

Petitioner's defense was also prejudiced by the destruction of hotel records of cooperating witness Alan Kent Cheshire, as well as the loss of memory due to the passage of time of the hotel owner, who originally gave those records to the government.

At trial, Cheshire testified about petitioner, Cheshire and two co-defendant's transporting 300 kilos of cocaine from Columbia. The cocaine was transported to the Bahamas, and was then ferried to the United States on June 26, 1986, by helicopter. Cheshire claimed to remember this incident because

Petitioner's helicopter was seized on June 27, 1986, while he was living at the Hilltopper Hotel. Records stipulated to by all parties prior to trial indicated that Cheshire and his wife (another government witness) had left the hotel June 12, 1986, two weeks prior to the incident. Unfortunately, these records disappeared during trial.[9]

Petitioner contacted the owners of the hotel, who claimed that due to the passage of time, they could not recall Cheshire, his wife, or the content of the records at all.

As Justice Powell stated in *Barker*"...there is also prejudice if defense witnesses are unable to recall accurately events of the faded past." 407

[9] Petitioner moved for a mistrial, dismissal of certain counts, and further moved to strike the witnesses testimony due to the loss of these records. The District Court denied the Motions, and the Eleventh Circuit ruled the issues to be without merit.

U.S. at 502, 92 S. Ct. at 2193. Petitioners defense was clearly prejudiced by the delay caused by the government in this case.

A fair determination of the *Barker* factors, as applied to Petitioner leads to the inescapable conclusion that he is entitled to relief, and that his speedy trial claims are not meritless.

II WHEN THE ELEVENTH CIRCUIT FOUND THAT ANTAGONISTIC DEFENSES EXISTED, COMPELLING PREJUDICE ALSO EXISTED REQUIRING REVERSAL OF PETITIONER'S CONVICTION.

During presentation of the defense case, Counsel for co-defendant Douglas Donahue informed the Court that Donahue wished to testify on his own behalf. Donahue's counsel advised the Court that his client would testify that Defendant's 1985 flight to Columbia had in fact

occurred just as cooperating government witness Alan Cheshire had testified.[10]

The District Court conducted a hearing on the matter during which Petitioner moved for severance on the basis of antagonistic defenses which could be raised not only by testimony of Donahue but also during Counsel's closing argument. The Court denied the motion, and Donahue elected not to testify. However, as stated by the opinion of the Eleventh Circuit, Donahue's closing argument incriminated Petitioner at every opportunity. [11] Donahue's counsel claimed that the plane trip to Columbia had occurred exactly as the government's

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[10] This 1985 flight to Columbia was the subject of counts Eleven through Fourteen of the indictment, which all Defendants were originally charged with. Co-defendants Donahue and Richard Mier were charged with these counts alone, two counts of which were dismissed by the government prior to trial.

[11] Panel opinion at 17 (Appendix A-34).

witnesses claimed; the idea was Petitioner's, and Donahue had been duped into flying the plane. Petitioner moved for mistrial during the closing argument. However, his motions were denied.

On appeal, the Eleventh Circuit found that Donahue's closing argument was antagonistic and mutually exclusive as to Petitioner, however, any error committed by the Court in denying Petitioner's Motion for Severance was not reversible because compelling prejudice could not be shown in light of the overwhelming evidence against Petitioner. Petitioner submits that this ruling is in error.

Courts have recognized that antagonistic defenses can prejudice co-defendant's to such a degree that they are denied a fair trial. *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978). In order to show that the District Court abused it's discretion in denying a

severance the Defendant must show that without severance he suffered compelling prejudice and was therefore unable to receive a fair trial. *United States v. Castillo-Valencia*, 917 F.2d 494 (11th Cir. 1990). In order to compel severance, the defenses must be more than antagonistic; they must be mutually exclusive. *United States v. Puig*, 810 F.2d 1085, 1088 (11th Cir. 1987).

In *United States v. Berkowitz*, 662 F. 2d 1127 (5th Cir. Unit B, 1981) the Court found:

> Where two Defendants present defenses that are antagonistic at their core, a substantial possibility exists that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. (citations omitted). If the essence of one Defendant's defense is contradicted by a co-defendant's defense, then the latter defense can be said to "preempt" the former. This sort of conflict between the Defendant's *creates the compelling prejudice that mandates severance*. (emphasis added) *Berkowitz*, at 1134.

The holding in *Berkowitz* was reiterated in *United States v. Rucker*, 915 F.2d 1511 (11th Cir. 1990), where the Court held that a Defendant may prove compelling prejudice by showing that he and his co-defendant's advanced defenses so antagonistic as to be "irreconcilable or mutually exclusive".

The panel's ruling ignores precedent set in it's own circuit. When the panel decided that antagonistic defenses actually existed, *that finding alone* serves as the compelling prejudice necessary to mandate a severance.

Petitioner recognizes that while Defendant's indicted together should normally be tried together, *United States v. Alvarez*, 755 F.2d 830, 857 (11th Cir. 1985), District Courts must balance the right of a Defendant to a fair trial against the interests of judicial economy and efficiency. *United States v. Gonzalez*,

804 F.2d 691 (11th Cir. 1980). Since Petitioner's trial was literally a day from being completed, judicial economy and efficiency would hardly have been impeded by severing the case, allowing Petitioner and the other two Defendants to finish their cases, and then allow Donahue to use the same jury, do a separate closing after Petitioner's verdict was returned, and get a separate verdict.

Appellant submits that if the Circuit Court determined there was overwhelming evidence, compelling prejudice existed and Petitioner's trial was intrinsically prejudicial. *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978) (conviction reversed on antagonistic defense claim despite "strong evidence of guilt" against Defendants).

By determining that Donahue's defense was antagonistic and mutually exclusive to Petitioner's, the panel, in effect, made a

finding that compelling prejudice existed, and Petitioners conviction should have been reversed.

III. THE COURT ERRED IN FAILING TO CONDUCT A HEARING ON PETITIONER'S MOTIONS TO SUPPRESS, AND MISAPPLIED THE *LEON* GOOD FAITH EXCEPTION TO A *FRANKS v DELAWARE* MOTION.

Prior to trial, Petitioner filed a Motion to Suppress alleging an improper search was conducted on his residence the day of his arrest. In his motion, Petitioner alleged that the Affidavit in support of the warrant was insufficient due to omissions and material misrepresentations made in the affidavit. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 1674, 57 L.Ed. 2d 667 (1978).

Petitioner further alleged that the warrant was insufficient due to stale information, therefore the warrant lacked probable cause, since the most recent information provided in the affidavit

occurred one year before the warrant was obtained, *Sgro v. United States*, 287 U.S. 206 (1927); the affidavit used unreliable hearsay from unreliable sources whose statements were not supported by any corroboration by the police, *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed. 2d 527 (1983); and that a general search had been conducted far outside the scope authorized by the warrant. *Andreson v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed. 2d 627 (1976).

The Motions to Suppress, along with a Motion for a Waiver of Local Rule 10 (c), which limits the length of written motions to twenty pages was filed on August 3, 1988. (Petitioner's Motion was 26 pages long).

On August 30, 1988 the District Court denied the Motion for Waiver of Local Rule 10(c), and struck the Motion to Suppress in it's entirety. Petitioner split the

Motion in half, and refiled them with the Court, who, in turn referred the motions to a United States Magistrate.

Despite being referred to the Magistrate five months prior to trial, the motions were not heard until the first day of trial.

On the first day of trial, the Court questioned Petitioner about the application of the "good faith" exception in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, S.Ct., 82 L.Ed. 2d 677 (1984) to the facts of petitioner's motion. Petitioner responded to the Courts inquiry, and the matter was dropped.

The next day, without conducting a hearing, or giving reasons for his actions, the Court denied the motions

stating that that was no need for an evidentiary hearing.[12]

Petitioner submits that the District Courts application of *Leon* to the facts of this case was incorrect, and the Circuit Courts finding of no merit to the issue is inappropriate.

In *United States v. Leon, supra*, this Court held that evidence obtained by law enforcement officials acting in objectively reasonable good faith reliance upon a search warrant is admissible even though the affidavit upon which the warrant is based was insufficient to establish probable cause.

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[12] Petitioner presumes that the Courts ruling was based upon the *United States v. Leon* "good faith" exception as it applied to a *Franks v. Delaware* motion. However, Petitioner is unaware of any written Order to that effect. Petitioner is also unaware of any ruling on the issues of staleness, general search, unreliability of the informants, etc. all of which would go to probable cause.

The Court, however, noted four instances where suppression of the evidence remained an appropriate remedy. One instance is when the Magistrate issued the warrant relying on a deliberately or recklessly false affidavit, *Leon*, 104 S. Ct. at 3421.[13]

Petitioner submits that the District court erred when it failed to conduct an evidentiary hearing on the motions, and compounded the error by misapplying the *Leon* good faith exception to a *Franks v. Delaware* motion.

The result of the Court's ruling was to allow into evidence literally thousands of illegally seized documents to be used as corroboration for witnesses of

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[13] Although the *Franks* decision itself only deleted the false material in the affidavit, Courts have recognized that the *Franks* decision applies to material omissions, as well as false statements, realizing that omissions lead to improper inferences just as surely as false statements.

questionable veracity, as well as the only evidence to prove several counts of the indictment. Due to the Court's error, Petitioner's conviction should be reversed.

IV. THE ELEVENTH CIRCUIT ERRED IN DETERMINING THAT PETITIONER'S CLAIMS OF REVERSIBLE CUMULATIVE ERROR WERE WITHOUT MERIT

On appeal, Petitioner raised the issue that due to the cumulative error committed before and during trial his conviction should have been reversed. The Eleventh Circuit concluded that despite raising some seventeen (17) points of error briefed in twelve (12) issues, that Petitioner's claims of cumulative error were without merit.

Petitioner raised many issues of Constitutional importance, including the denial of his Constitutional and Statutory speedy trial rights; the failure of the Court to dismiss the Indictment based upon

the Government's destruction of vital exculpatory evidence; the mis-application of the *Leon* standard to a *Franks v. Delaware* motion, the failure of the Court to conduct a hearing on Petitioner's motions to suppress, as well as the Court's failure to address several issues raised by the motions to suppress; allowing evidence of Petitioner's prior record, prior uncharged bad acts, prior arrests, prior incarceration, and parole board problems into evidence before the jury without adequate notice to the defense, and denial of Petitioner's many motions for mistrial based upon the government's introduction of that extrinsic evidence. Along with the erroneously admitted extrinsic act evidence, the trial court also reversibly erred by limiting the cross-examination of critical government witnesses; failed to allow a defense witness to testify in

violation of Federal Evidence Rule 609; failed to strike the testimony of two crucial government witnesses after the government had failed to provide *Brady* evidence which would have impeached them; failed to grant a dismissal of the case or mistrial when the government "lost" evidence they had stipulated to prior to trial; failed to grant a mistrial when a government witness blurted out non-responsively that he had passed a polygraph (thereby leaving the jury to believe that all government witnesses had taken and passed polygraphs, or they would not have been allowed to testify), allowed into evidence a written D.E.A. report which defense counsel had never seen until the witness testified at trial; and, finally, had Appellant's counsel re-argue his closing argument after deciding that the jury instructions the Court had

previously ruled would be given to the jury were incorrect.

Petitioner is aware that a perfect trial is not guaranteed, however, Petitioner was denied his right to a fundamentally fair trial due to the numerous errors committed by the District court, who permitted the jury to hear inadmissible evidence which must have affected their verdicts.

Petitioner submits that the Eleventh Circuit could not have considered the cumulative effect of each error to determine whether, viewing the trial as a whole, Petitioner received a fair trial. *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983). When viewing the trial as a whole, as the *Blasco* standard demands, petitioner's convictions should be reversed. [14]

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[14] In addition, to Petitioner's claims of error during trial, he also raised the issue of improper sentencing when the

CONCLUSION

Based on the foregoing reasons, the Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Court adjudicated him guilty of conspiracy charges in addition to the continuing criminal enterprise charge in violation of *United States v. Nixon*, 918 F.2d 895 (11th Cir. 1990). The Eleventh Circuit opinion does not address this issue.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5426

D. C. Docket No. 87-8028-CR-NCR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD STAFFIRE and FRANK BACHNER,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(September 24, 1991)

Before KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge

PER CURIAM:

This case involves two defendants, Frank Bachner and Edward Staffire, who were charged with several drug-related offenses. After a jury trial, Bachner was convicted of all nineteen counts in his indictment, and Staffire was convicted of six out of seven counts. Bachner and Staffire challenged their convictions on several grounds. Most notably, they assert error with respect to the district court's denial of their severance motions based on a co-defendant's alleged antagonistic defense. For the reasons that follow, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

The background of this case principally involved the facts relevant

to two smuggling ventures in which Bachner and Staffire participated. The first venture, orchestrated by appellants and Joseph Chimera, occurred in 1982 and involved the importation of cocaine by means of Bachner's private plane. The second smuggling venture in 1985 was more complex, involving many participants, including Bachner, Staffire, Alan Cheshire, and the appellants' co-defendants Douglas Donahue and Richard Mier. Additionally, Bachner was establishing himself as an ether supplier to cocaine producers in South America.

In 1982, Bachner discussed with Chimera his plan to fly cocaine into Florida. Chimera was familiar with a cemetery that he proposed as a secure drop-site. The two men agreed that Bachner would drop cocaine-filled body

bags into the cemetery, where Chimera would retrieve them and return them to Bachner. Bachner mentioned to Chimera that a veteran from Vietnam named "Ed" would be flying with him.

The onset of the second venture began early in 1985 when Bachner became acquainted with Cheshire. Shortly thereafter, Bachner recruited Cheshire to move to Florida. In March or April 1985, Bachner, Cheshire, Donahue and Mier flew in Bachner's Albatross, an amphibious flying boat, to Haiti via Puerto Plata and then back to the United States. Thereafter, Staffire and Cheshire traveled in Bachner's helicopter to stash two cans of jet fuel in the Bahamas. A week or two later, Bachner, Donahue, Mier and Cheshire, on a flight to Colombia, stopped in the Dominican Republic where

John Phillips boarded their aircraft. Upon arrival to Colombia, they landed the plane in the forest where they were met by armed men who loaded cocaine-filled duffel bags onto the Albatross. As soon as the loading was completed, Bachner directed Donahue to take off.

On its flight back to Florida, the Albatross was intercepted by an attack jet which fired several hundred rounds into the water in front of the Albatross and then directly at it. After the attack jet lost contact, the crew landed the Albatross in the Bahamas. The next day Bachner and Cheshire hid the duffel bags in the brush. After two nights in the Bahamas at Bachner's expense, Cheshire, Bachner and Donahue took a commercial return flight to Palm Beach. The day after their return, Cheshire,

Cheshire's wife, Denise, and Staffire sewed two cargo nets designed for use in retrieving the cocaine-filled bags.

Bachner and Cheshire used Bachner's helicopter to retrieve the cocaine. They moved it to a new location in the Bahamas and investigated possible landing sites for importation. Cheshire and Staffire then used the helicopter to load the cocaine. They unloaded the cargo and flew the helicopter to Bachner's house, where they noticed a plane overhead. Later, the helicopter was seized by United States Customs. Bachner consigned portions of the cocaine shipment to Cheshire, with the understanding that Cheshire could retain any sums receive for same in excess of $60,000.

George Chappell and Bachner were acquainted in the 1970's. Acting as an

informant for the Federal Bureau of Investigation, Chappell contacted Bachner in February, 1986. Bachner made a number of admissions to Chappell and arranged to sell Chappell several kilos of cocaine. Bachner advised Chappell that he was establishing himself as an ether supplier to cocaine producers in South America. Bachner boasted that he had already shipped mislabelled either to Aruba. In November, 1986, the Drug Enforcement Agency (DEA) and Aruba authorities discovered one hundred drums of ether belonging to Bachner. Bachner and the other defendants were arrested in 1987. Numerous incriminating items associated with drug-dealing were discovered at Bachner's residence, including five money counting machines and a heat sealing machine with plastic bags.

The charges in Bachner's indictment spanned a five year period from May, 1982 to February, 1987 and included conspiracy, importation and possession with the intent to distribute cocaine. The government presented evidence connecting Bachner and Staffire to the 1982 and 1985 cocaine smuggling ventures. Cheshire served as a key government witness and testified at trial with respect to the aforementioned facts relative to the 1985 venture. The prosecution offered proof that Bachner was involved in a continuing criminal enterprise to import cocaine. Evidence also was presented that Bachner was establishing himself as an either supplier in Aruba.

At the appellants' trial, in order to establish Staffire's participation with Bachner in the 1982 cocaine importation conspiracy, the government offered the testimony of Chimera. Chimera stated that he and Bachner had agreed that Bachner would drop the drugs from Bachner's Aerostar plane in body bags to Chimera, who would be waiting in a cemetery to retrieve them. The drop point was miscalculated, and the cocaine was not located for several days. Chimera testified that Bachner had told him that a man named "Ed" who was "a veteran pilot or just a veteran from Vietnam" would be in the plane with him. R2-190 (trial transcript). Moments after Chimera notified Bachner that the cocaine-filled body bags had been found, Bachner made a call to Staffire's

telephone. Further bolstering the case against Staffire, government witness Cheshire testified that Staffire admitted to him in a 1985 conversation that he had once dropped a load of cocaine from a Ted Smith Aerostar plane, using a cemetery as a receiving target. Staffire stated that they had missed the target, and that it took them days to locate the drugs.

Donahue and Mier, the appellants' co-defendants at trial, were both acquitted by the jury. On appeal, Bachner and staffire argue that their motions for severance, filed upon notice that Donahue would testify, were erroneously denied due to co-defendant Donahue's antagonistic defense. In closing argument, it was Donahue's defense that (1) the alleged 1985 smuggling flight between Palm beach and

Colombia, as testified to by Cheshire, did in fact occur, (2) Bachner was the man in charge, and (3) Donahue was merely an innocent and uninformed pilot of the plane.

II. CLAIMS PRESENTED

A. Staffire

Staffire claims that the following actions by the district court constitute reversible error: (1) erroneous denial of his motion for judgment of acquittal on the basis of insufficient evidence as to counts two, three and four, related to the 1982 smuggling venture; (2) the admission of Chimera's hearsay testimony with respect to the 1982 venture; (3) the admission of his allegedly uncorroborated admission to Cheshire; and (4) erroneous denial of his severance motion when co-

defendant Donahue presented a purported antagonistic argument during closing.

B. Bachner

Bachner challenges his conviction son the following grounds: (1) erroneous denial of a motion to dismiss the indictment on constitutional and statutory speedy trial grounds; (2) failure to grant a motion to dismiss the indictment based on Brady violations; (3) failure to conduct an evidentiary hearing on a motion to suppress and the denials of the motion without written findings of fact and conclusion of law; (4) denial of a motion for judgment of acquittal on the continuing criminal enterprise count; (5) the improper introduction of prior criminal record not charged in the indictment; (6) failure to strike testimony of witnesses Cheshire and

Denise Mize and to dismiss counts eleven through eighteen due to Brady violations; (7) erroneous denial of a motion for bill of particulars; (8) erroneous denial of a motion for judgment of acquittal based on insufficiency of the evidence as to counts seventeen and eighteen; (9) failure to grant severance and mistrial after admitting a prejudicial DEA report; (10) erroneous denial of a motion for mistrial based on government witness' testimony regarding the use of a polygraph; (11) prejudicial change of jury instructions after counsel made closing arguments; (12) erroneous denial of a motion for severance due to an antagonistic defense presented by co-defendant Donahue; and (13) cumulative error.

III. DISCUSSION

A. Sufficiency Of The Evidence As To Staffire's Convictions For 1982 Smuggling

Staffire claims that there is insufficient evidence of the 1982 smuggling venture to support his conviction. In reviewing the sufficiency of the evidence to support a conviction, this court "must determine whether, viewing the evidence in the light most favorable to the government, . . . a reasonable trier of fact could find guilt beyond a reasonable doubt." United States v. Gonzalez, 719 F.2d 1516, 1521 (11th Cir. 1983), cert. denied, 465 U.S. 1037, 104 S. Ct. 1312, 79 L.Ed.2d 710 (1984). "[W]e are guided by the rule that all the evidence, direct and circumstantial, must be viewed in the light most favorable to

the government, accepting all reasonable inference and credibility choices that tend to support the jury's verdict." United States v. Eley, 723 F.2d 1522, 1525 (11th Cir. 1984) (citing United States v. Cardona, 650 F.2d 54, 57 (5th Cir. 1981)). it is not necessary that the evidence excluded every reasonable hypothesis of innocence or be wholly inconsistent with very conclusion except guilt, provided that a reasonable trier of fact could find that the evidence supports guilty verdict beyond a reasonable doubt. United States v. Montes-Cardenas, 746 F.2d 771, 778 (11th Cir. 1984).

We find that the government's evidence as to Staffire's guilt relative to the 1982 smuggling venture was substantial. It consisted of Chimera's

testimony that Bachner told him that his co-pilot would be a veteran pilot from Vietnam named "Ed," Cheshire's testimony that Staffire admitted to him that he brought cocaine into Florida and air-dropped it in body bags into a cemetery, together with other incriminating evidence. Applying the applicable standard of review, we find that the evidence adequately supported the jury's return of a guilty verdict.

B. **Admissibility of Chimera's Hearsay Testimony**

Staffire claims that the district court committed reversible error as a result of Chimera's testimony relating to Bachner's statement that the second person on the plane used for the 1982 smuggling venture was "Ed, a veteran pilot from Vietnam." R2-190 (trial

transcript). Staffire claims the statement should not have been admitted under the co-conspirator statement exception to the hearsay rule. For inclusion under this rule, the statement must be "by a co-conspirator of a party during the course and in furtherance of the conspiracy." Fed. R.Evid. 801(d)(2)(E).

We review the trial court's evidentiary rulings to determine whether there was an abuse of discretion resulting in substantial prejudice to the appellant. United States v. Nixon, 918 F.2d 895, 905 (11th Cir. 1990). Staffire contends that the statement by Bachner to Chimera was merely idle chatter and, therefore, not made in furtherance of the conspiracy as required by Fed.R.Evid. 801(d)(2)(E).

This court has excluded mere conversation from the co-conspirator statement exception to the hearsay rule. United States v. Miller, 664 F.2d 94, 98 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 854, 103 S.Ct. 121, 74 L.Ed.2d. 106 (1982); United States v. McGuire, 608 F.2d 1028, 1032 (5th Cir. 1979), cert denied, 444 U.S. 1092, 100 S.Ct. 1060, 62 L.Ed.2d 782, 446 U.S. 9910, 100 S.Ct. 1838, 64 L.Ed.2d 262 (1980). Conversation, however, is admissible when used by the declarant to obtain the confidence of his co-conspirator. McGuire, 608 F.2d at 1033. It was unlikely that Bachner, alone in the plane, could have piloted the Aerostar in the necessary mode and hoisted the cocaine-filled body bags out of the plane. The statement by Bachner to

Chimera, therefore, was in furtherance of the conspiracy because it was spoken to obtain Chimera's confidence by informing him of the necessary details of their conspiratorial scheme. See United States v. Caraza, 843 F.2d 432, 436 (11th Cir. 1988) (statement by appellant's co-conspirator to boat captain not idle chatter because captain's knowledge of appellant's status could affect future dealings between co-conspirator and captain).

C. **The Admission Made By Staffire To Cheshire**

Staffire asserts that the district court improperly admitted the testimony of Cheshire establishing that Staffire informed him about Staffire's involvement in the 1982 smuggling venture. As noted above, our standard of review for the

trial court's evidentiary rulings is whether there was an abuse of discretion resulting in substantial prejudice to the appellant. United States v. Nixon, 918 F.2d at 905. In Smith v. United States, 348 U.S. 147, 155 n.3, 75 S.Ct. 194, 198 n.3, 99 L.Ed. 192 (1954), the Court noted that, "admissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated."

We find that the trial court's allowance of Cheshire's testimony relating to Staffire's admission that he once dropped cocaine in body bags from a Ted Smith Aerostar into a cemetery where the bags could not be found for several days was not an abuse of its discretion. The very unique nature of the incident provides a strong inference of

reliability. Even assuming that the admission was not corroborated by independent evidence, the admission was adequately reliable to be admitted into evidence.

D. **Adequacy of Government's Continuing Criminal Enterprise Case Against Bachner**

In order to establish a continuing criminal enterprise pursuant to 21 U.S.C. Section 848, the government must prove beyond a reasonable doubt that: (1) the defendant violated a section of 21 U.S.C. Section 801, et seq.; (2) the crime was a part of a continuing series of like violations; (3) the crime was undertaken in concert with five or more other people; (4) with respect to the other people, the defendant occupied a position of organizer, supervisor, and any other

position of management; and (5) as a result of the crimes the defendant obtained a substantial income. 21 U.S.c. Section 848(c). Bachner contends that the government failed to prove that he was involved in a continuing series of violations or that he supervised at least five other people in the commission of those violations. The facts of this case are analogous to those in United States v. Michel, 588 F.2d 986 (5th Cir.), cert. denied, 444 U.S. 825, 100 S. Ct. 47, 62 L.Ed.2d 32 (1979). In that case the appellant characterized himself as no more than an equal participant in isolated smuggling ventures. The court in Michel pointed to the seven government witnesses who testified that all or part of their involvement in smuggling was under the direction of the appellant.

Those witnesses also testified that others, including co-defendants were working for the appellant. The court concluded that the appellant's claim that the government had failed to prove a continuing series of violations in which he supervised at least five people was frivolous. Id. at 1000.

The government offered evidence against Bachner as substantial as that in the Michel case. Specifically, the government showed that Bachner was directing more than five people including Staffire, Cheshire, Denise Cheshire, Joseph Chimera, Edward Chimera, George Chappell, Randy Habibe, and Paul Bachner, Frank Bachner's brother. Moreover, this court has interpreted "a continuing series of violations" as meaning three or more violations. United States v.

Brantly, 733 F.2d 1429, 1436 (11th Cir. 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985). Bachner was convicted of fourteen separate drug offenses, all relating to cocaine. Therefore, we reject Bachner's contentions and affirm the guilty verdict as to the continuing criminal enterprise count.

E. **Denial of Bachner's And Staffire's Severance Motions Based On Co-Defendant's Antagonistic Defense**

Bachner and Staffire contend that the district court abused its discretion in denying their motions for severance pursuant to Fed.R.Crim.P. 14. They assert that their co-defendant Donahue's closing argument presented an antagonistic defense creating prejudice

and preventing a fair trial. We disagree.

The appellants' concern over Donahue's alleged antagonistic defense was prompted at trial when Donahue's counsel informed the district court that Donahue had decided to testify. At this time, Donahue intended to testify that the 1985 flight to Colombia to acquire cocaine occurred just as government witness Cheshire had testified, and that Bachner had duped Donahue into piloting the plane.

The district court entertained counsels' arguments on the issue. During this discussion, counsel for Bachner not only referred to the problem on Donahue's antagonistic testimony, but also referred to the potential for antagonism in Donahue's closing argument. At the close

of the discussion, Bachner and Staffire moved for severance based on their co-defendant's antagonistic defense. The trial court denied their motions for severance. Thereafter, Donahue decided not to testify. During Donahue's closing argument, Bachner interrupted twice to reserve "a motion." The record does not reveal any further action taken by the defendants to articulate that reserved motion.

This court must decide whether the initial motions made by Staffire and Bachner adequately preserved their right to appeal the denial of severance. If the objections by counsel were inadequate, the denial of severance should be reviewed only for plain error. United States v. Hernandez, 896 F.2d 513, 523 (11th Cir.), cert. denied, _ U.S. _,

111 S.Ct. 1'59, 112 L.Ed.2d 125 (1990). However, if their objections were preserved, we must determine that there is a clear showing of abuse in order to disturb the trial court's decision. United States v. Perez, 489 F.2d 51, 65 (5th Cir.), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1973).

The government argues that Staffire's and Bachner's motions were rendered moot when Donahue decided not to testify because the only remaining ground for the severance motion was the antagonistic nature of the closing argument by Donahue's attorney. However, in a colloquy during the trial, the defense sufficiently put the trial court on notice that an antagonistic defense might be asserted by means of Donahue's attorney. R.11-1620 (trial transcript).

Therefore, we find that Bachner's and Staffire's severance motions were not mooted by Donahue's decision not to testify. Accordingly, we will evaluate the merits of this issue.

When reviewing the district court's denial of a severance motion under an abuse of discretion standard, we must determine whether the joint trial resulted in specific and compelling prejudice against which the trial court could not adequately protect. United States v. Kabbaby, 672 F.2d 857, 861 (11th Cir. 1982). Generally, persons jointly indicted should be tried together, particularly when the charges involve conspiracy. United States v. Davenport, 935 F.2d 1223, 1240 (11th Cir. 1991). Federal Rule of Criminal Procedure 14 "requires the trial court to

balance the right of defendants to a fair trial, absent the prejudice inherent in a joint trial, against the interests of judicial economy and efficiency." United States v. Gonzalez, 804 F.2d 691, 694 (11th Cir. 1986). To establish an abuse of discretion, the appellant must prove "'that without severance he was unable to receive a fair trial and that he suffered compelling prejudice against which the trial court could offer no protection.'" Id.(quoting United States v. Magdaniel-Mora, 746 F.2d 715, 718 (11th Cir. 1984).

Severance is mandated if a co-defendant's defense is antagonistic and mutually exclusive. Such antagonism exists if the jury, to believe the core testimony of one defendant, must disbelieve the testimony of a co-defendant. Id. at 695. for example, in

Gonzalez this court reversed the appellant's conviction where a co-defendant incriminated the appellant at every opportunity, the co-defendant served as the government's principal witness against the appellant, and the co-defendant's counsel spent more time during closing argument blaming the appellant than exonerating his client. 804 F.2d at 695-96. A defense is insufficiently antagonistic when the co-defendants' defenses were not so incompatible that the jury could reasonably have decided on a version of events that accommodated both theories. United States v. Cross, 928 F.2d 1030, 1038 (11th Cir. 1991). Stated differently, if it is not a case in which the co-defendant's defense necessarily

implicated the appellant's guilt, it is not antagonistic. Id.

An appeal based on a Rule 14 error requires the precise showing that denial of the severance motion resulted in compelling prejudice. United States v. Kabbaby, 672 F.2d 857, 861 (11th Cir. 1982). In light of the overwhelming evidence against Bachner, we find that any error in the trial court's denial of Bachner's severance request is not reversible because such compelling prejudice cannot be shown. Although Donahue's closing argument was antagonistic and mutually exclusive as to Bachner, we are nevertheless convinced that Bachner received a fair trial and that the verdict was not prejudiced.

The government's case against Staffire was not as overwhelming as its

case against Bachner. Therefore, we must closely examine the propriety of the trial court's actions in denying Staffire's motion for severance. Compelling prejudice is found only if the jury could not follow the district court's instructions and apportion the evidence relevant to the respective defendants. United States v. Smith, 918 F.2d 1551, 1559-60 (11th Cir. 1990). According to the law of this circuit, the prejudice due to a joint trial can be remedied by cautionary instructions. id. The trial court in this case instructed the jury to consider each offense and each defendant separately and individually. Moreover, it charged the jury that if it found one defendant guilty or not guilty, that finding should

not affect its verdict as to any other offense or defendant.

Staffire's claim would be stronger had the jury returned a verdict of guilty on all counts. A split verdict indicates that the jury considered the evidence carefully and refutes any allegation of "compelling prejudice." United States v. Hernandez, 921 F.2d 1569, 1580 (11th Cir.), cert. denied, _ U.S. _, 111 S.Ct. 2271, 114 L.Ed.2d 722 (1991). In the case at bar, the jury found Staffire guilty of some, but not all, counts against him in the indictment. The jury also convicted two defendants while acquitting two others of charges relating to the same incident. The jury was evidently able to apportion the evidence and followedthe admonishing instructions of the district court.

Moreover, the defense asserted by Donahue was not adequately antagonistic as to Staffire to warrant reversal. Donahue's defense implicated Bachner's, not Staffire's, guilt. See United States v. Cross, 928 F.2d 1030, 1038 (11th Cir. 1991) (finding co-defendant's defenses not antagonistic because one defendant's defense failed to suggest the other defendant's guilt). Donahue's closing argument incriminated Bachner, not Staffire, at every opportunity. See United States v. Perez-Garcia, 904 F.2d 1534, 1547 (11th Cir. 1990) (stating that defenses are mutually irreconcilable where one defendant incriminates the other at every opportunity). Although Donahue's defense asserted that the 1985 Colombia smuggling venture occurred, that assertion is not totally incompatible

with Staffire's innocence. The jury could believe that Bachner manipulated the unknowing Donahue into piloting his plane and still believe that Staffire played no part in the scheme. Furthermore, we have observed in other cases that it would be unusual to find compelling prejudice necessitating severance when the defense does not involve the presentation of evidence, but rather is pure argument. See United States v. Van Horn, 789 F.2d 1492, 1506 (11th Cir.), cert. denied, 479 U.S. 854, 107 s.Ct. 190, 93 L.Ed.2d 123 (1986); United States v. Magdaniel-Mora, 746 F.2d 715, 718 n.3 (11th Cir. 1984), reh'g denied, 751 F.2d 1261 (1985).

Staffire claims prejudice due to Donahue's defense which bolstered the testimony of government witness Cheshire

as to the facts of the 1985 Colombia venture. Staffire allegedly was prejudiced because Cheshire was also the main witness as to Staffire's involvement in the 1985 smuggling. However, this is not prejudicial to Staffire because the jury could reasonably believe Donahue's defense without accepting the entirety of Cheshire's testimony. Accordingly, the district court did not err in refusing to grant Staffire's motion for severance.

IV. CONCLUSION

We have carefully examined the remaining claims of the appellants. We find them to be without merit. Accordingly, we AFFIRM appellants' convictions.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5426

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD STAFFIRE and

FRANK BACHNER,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH and BIRCH, Circuit Judges, DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the

Suggestion(s) of Rehearing En Banc are DENIED.

( ) The petition(s) for rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested of poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of its Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/s
UNITED STATES CIRCUIT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Rule 609 of the Federal Rules of Evidence states in pertinent part:

Impeachment by Evidence of conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness.

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has

been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence out weighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Title 18 United States Code 3161 h(8)(A) states in pertinent part:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted

such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Supreme Court, U.S.
FILED

No. 92-501

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK BACHNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the delay between the return of the indictment and the commencement of petitioner's trial violated his constitutional or statutory rights to a speedy trial.

2. Whether petitioner was prejudiced by the district court's denial of his motion for a severance because a co-defendant's attorney presented an antagonistic defense at trial.

3. Whether the district court erred in failing to conduct a hearing on petitioner's motions to suppress evidence seized during the search of his house.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-501

FRANK BACHNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is unpublished, but the judgment is noted at 946 F.2d 1546 (Table), *sub nom. United States* v. *Staffire*.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1991. A petition for rehearing was denied on December 26, 1991. Pet. App. A37-A39. On March 20, 1992, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 22, 1992. On April 14, 1992, Justice Kennedy granted a further extension to and including May 22, 1992. The petition was filed on May 21, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conducting a criminal enterprise, in violation of 21 U.S.C. 848; five counts of conspiring to manufacture, import, and distribute cocaine, in violation of 21 U.S.C. 846 and 963; two counts of importing cocaine, in violation of 21 U.S.C. 952(a); four counts of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); two counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); one count of attempting to manufacture cocaine with the intent to import it into the United States, in violation of 21 U.S.C. 963; and one count of receiving stolen government property, in violation of 18 U.S.C. 641. Gov't C.A. Br. 3. He was sentenced to life imprisonment and was fined $2,750,000. The court of appeals affirmed. Pet. App. A1-A36.

1. Petitioner was the leader of a cocaine smuggling and distribution ring that operated in Florida during the 1980s; the crimes involved in this case arose out of three incidents. First, in 1982, petitioner and Edward Staffire smuggled a load of cocaine into the United States from Colombia in an airplane owned by petitioner.

The second incident occurred three years later, when petitioner and Douglas Donahue flew to Colombia in an amphibious flying boat (referred to as an Albatross) owned by petitioner. Two other men, Alan Cheshire and Richard Mier, accompanied petitioner and Donahue. The men picked up a load of cocaine in Colombia and flew it to an island in the Bahamas. After returning to Florida, petitioner and Cheshire used petitioner's helicopter to

retrieve the cocaine from the island. They moved the cocaine to another location in the Bahamas, where it could be stored while they investigated possible landing sites in the United States. Later, acting on instructions from petitioner, Cheshire and Staffire flew the helicopter to the Bahamas, retrieved the cocaine, and delivered it to petitioner at the selected landing site in Florida.

Finally, in 1986, petitioner arranged to sell cocaine to FBI informant George Chappell. Petitioner told Chappell that he was establishing himself as a supplier of ether (a solvent used in processing cocaine) to cocaine producers in South America, and that he already had shipped ether to Aruba. DEA agents and Aruban authorities later discovered 100 drums of ether that belonged to petitioner. Pet. App. A6-A7.

Petitioner and other members of the smuggling ring were arrested in 1987. After petitioner's arrest, law enforcement officers obtained a warrant to search his house. During the search, the officers found numerous items used in packaging and distributing cocaine, including money counting machines and a heat-sealing machine that was used to seal plastic bags. Pet. App. A7.

2. An indictment returned on March 17, 1987, charged petitioner and co-defendants Staffire, Donahue, and Mier with narcotics offenses. Gov't C.A. Br. 2. Petitioner was detained pending trial. Gov't Habeas C.A. Br. 3.[1]

Before trial, petitioner filed two motions to suppress evidence seized during the warrant-authorized search of his house. In one motion, petitioner claimed that the af-

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[1] "Gov't Habeas C.A. Br." refers to the brief filed by the government in response to petitioner's appeal from the district court's order denying petitioner's petition for a writ of habeas corpus seeking release from pretrial detention. That appeal was docketed in the court of appeals as Nos. 88-6209 and 88-6230.

fidavit used to obtain the warrant was insufficient to establish probable cause, that the affidavit contained stale information and unreliable hearsay, and that the scope of the search exceeded that authorized by the warrant. Motion to Suppress [Probable Cause Motion] 2-15. In the other motion, petitioner asserted that the warrant affidavit contained material misrepresentations and omissions, and that under this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), he was entitled to an evidentiary hearing to determine if the officers intentionally or recklessly included false information in the affidavit.[2] Motion to Suppress [*Franks* Motion] 3-13. The government filed a detailed response to petitioner's suppression motions. In response to petitioner's first motion, the government disputed petitioner's claim that the warrant affidavit was insufficient to establish probable cause. Answer to Motion to Suppress 2-4. In any event, the government contended, the evidence seized under the warrant should not be suppressed because the officers who conducted the search reasonably and in good faith believed that the warrant was valid. Answer to Motion to Suppress 8-9. With respect to petitioner's *Franks* motion, the government argued that petitioner's assertions that the warrant affidavit contained material misrepresentations and omissions were unsupported and misleading, and that petitioner had not made a sufficient

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[2] In *Franks*, the Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156.

threshold showing to obtain an evidentiary hearing under *Franks*. Answer to Motion to Suppress 9-18.

Before trial, petitioner filed a petition for a writ of habeas corpus, seeking release from custody based on his contention that the delay between the indictment and the trial violated his constitutional and statutory rights to a speedy trial. The district court concluded that the cause of the delay was the "unprecedented length" of another criminal trial in the same district,[3] in which the attorney who represented petitioner's co-defendant Donahue was involved. Gov't Habeas C.A. Br. 4-5, 12. The district court denied the habeas petition without opinion. See *id.* at 12-15.

Petitioner's trial began on February 6, 1989. Gov't C.A. Br. 2. On the first day of trial, the district court heard argument on petitioner's suppression motions. The following day, after hearing further argument, the court denied both motions, stating that it had reviewed the affidavit and search warrant and that it did not believe an evidentiary hearing was necessary. See Gov't C.A. Br. 36.

Petitioner was tried together with Staffire, Donahue, and Mier. During trial, Donahue's attorney informed the court that Donahue intended to testify that peti-

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[3] Trial in the other case began in November 1987 and continued until January 1989. Gov't Habeas C.A. Br. 5. The district court considering the habeas petition noted that "[t]he expectation at the beginning of [the other] case was [that] it would be done [in] six months or less," and that neither the court nor the lawyers could have foreseen that the trial would continue for more than a year. *Id.* at 12. The court also explained that there was "a published policy in this district that whatever judge begins a trial with lawyers, that judge understandably has the right to continue the trial to its conclusion[,] * * * so that a prior [trial] setting then gives priority and right to the lawyer's services." *Id.* at 13.

tioner had directed the 1985 smuggling flight to Colombia and had duped Donahue into piloting the aircraft. Petitioner then moved for a severance, claiming that his defense and Donahue's were antagonistic. The district court denied the motion. Donahue eventually decided not to testify, but his attorney's closing argument suggested that the government's witnesses had correctly described petitioner's activities. Pet. App. A25-A26, A34-A35.

3. On appeal, petitioner argued that the trial court should have severed his trial from Donahue's because of the conflict between his defense and Donahue's. Pet. App. A10-A11. The court of appeals rejected that claim. *Id.* at A24-A31. The court of appeals acknowledged that the defense presented by Donahue's attorney was "antagonistic and mutually exclusive as to [petitioner]," but held that any error in the district court's denial of petitioner's severance motion did not require reversal of his conviction because petitioner could not show "compelling prejudice" resulting from the district court's refusal to sever his trial from that of his co-defendant. *Id.* at A31. Observing that the evidence of petitioner's guilt was "overwhelming," the court stated that it was "convinced that [petitioner] received a fair trial and that the verdict was not prejudiced" by the comments of Donahue's attorney. *Ibid.*

Petitioner also argued that the district court erred in refusing to dismiss the indictment based on violations of his constitutional and statutory speedy trial rights, and that the court erred in failing to conduct a hearing on his motions to suppress the evidence seized during the search of his house. Pet. App. A12. The court of appeals did not specifically address those contentions, but stated that it had "carefully examined" petitioner's claims

other than the severance claim and had found them to be "without merit." *Id.* at A36.

ARGUMENT

1. Petitioner first contends (Pet. 7-19) that the delay between his indictment in March 1987 and the commencement of his trial in February 1989 violated his right to a speedy trial. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court set out a four-factor test for determining whether delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's Sixth Amendment right to a speedy trial. The test requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay. 407 U.S. at 530-533. Although the delay of almost two years between petitioner's indictment and the beginning of trial justifies inquiry into the other *Barker* factors, petitioner's claim nevertheless fails because none of the other factors supports petitioner's claim.

First, petitioner is incorrect in asserting (Pet. 13) that the cause of the delay was an effort on the part of the government to postpone the trial "so that a preferred prosecutor could try the case." In fact, the district court found that the cause of the delay was the "unprecedented length" of another criminal trial in the same district, in which the attorney who represented petitioner's co-defendant Donahue was involved. See Gov't Habeas C.A. Br. 4-5, 12. Although the prosecutor who was originally assigned to this case also was involved in the other trial, the government made it clear to the court that it was prepared to proceed to trial in this case with another prosecutor. See *id.* at 7 ("if the Court says to the United States the trial date is set, * * * I will just be ready to

try it when the Court says to try it"). The pretrial delay, which resulted from the unavailability of the co-defendant's attorney and the co-defendant's inability or unwillingness to obtain other counsel, cannot fairly be attributed to the government.[4]

Second, petitioner did not assert his right to a speedy trial until October 1988, when he filed a petition for a writ of habeas corpus seeking release from detention and dismissal of the indictment on the ground that his speedy trial rights had been violated.[5] Moreover, the habeas petition makes clear that petitioner's principal interest was in obtaining his release from custody, not in securing a speedy trial. See Motion to Dismiss, C.A. App. Pt. C.

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[4] For this reason, the Court's decision in *Doggett* v. *United States*, 112 S. Ct. 2686 (1992), does not have any direct effect on the decision of the court of appeals. In *Doggett*, the Court held that an "extraordinary" eight-and-one-half-year delay between the defendant's indictment and arrest, which resulted from the government's "egregious persistence in failing to prosecute [him]," violated his right to a speedy trial. *Id.* at 2691, 2694. The period of pretrial delay in this case was far shorter than that in *Doggett*, and the delay here was not attributable to negligence on the part of the government.

[5] Petitioner errs in stating (Pet. 9) (without any supporting citation) that he "objected to each continuance, and sought severance from his co-defendant [Donahue]." Indeed, at a status conference in January 1988, petitioner's counsel advised the district court that "speaking for [petitioner], if the Government wanted a continuance to continue the case, I have no objection," as long as petitioner was concurrently released from custody. Gov't Habeas C.A. Br. 8-9. The record does not indicate that petitioner ever objected to any of the other continuances. Similarly, contrary to petitioner's statement, he did not file a pretrial motion for severance. See Gov't Habeas C.A. Br. 4; Docket Sheet, C.A. App. Pt. A.

Finally, petitioner failed to show sufficient prejudice to justify dismissal of the indictment. As the district court stated in rejecting the speedy trial claims raised in petitioner's habeas petition, petitioner had "introduced nothing and proffered nothing" to show prejudice and had "not even alluded to any real prejudice under the constitutional tests." Gov't Habeas C.A. Br. 15. Petitioner's only claim that the pretrial delay impaired his defense rests on his assertion (Pet. 17-18) that certain hotel records that might have cast doubt on the testimony of one of the government's witnesses were destroyed and that the owners of the hotel were unable to remember the contents of the records. That assertion is incorrect. Although the substitute Assistant United States Attorney who tried the case thought he would introduce such records into evidence, and requested that petitioner stipulate to their authenticity at the beginning of trial, the prosecutor discovered during trial that he had been mistaken about the existence of the records and that no such records had ever existed. See Gov't C.A. Br. 56-57.[6] Petitioner could not have been prejudiced by the loss of evidence that was never in existence. In the absence of any showing that his defense was hampered, petitioner's general claims of hardship resulting from the pretrial delay are not sufficient to establish a constitutional violation. See *United States* v. *Juarez-Fierro*, 935 F.2d 672, 676 (5th Cir.) (defendant's "conclusory statements" about anxiety he suffered as a result of delay, without a showing that his defense was impaired, were insufficient to support a constitutional speedy trial claim), cert. denied, 112 S. Ct. 402 (1991); *Flowers* v. *Warden*, 853 F.2d

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[6] Contrary to petitioner's assertion (Pet. 18), the parties never stipulated to the existence or authenticity of the records. See Gov't C.A. Br. 57.

131, 132-134 (2d Cir.) (where delay resulted from court congestion and there was no impairment of defense, "significant hardship" from 17 months of pretrial incarceration did not establish a constitutional speedy trial violation), cert. denied, 488 U.S. 995 (1988).[7]

2. Petitioner also contends (Pet. 19-25) that the district court's refusal to sever his trial from that of his co-defendant Donahue required reversal of his conviction. The court of appeals correctly rejected that claim.

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[7] Although petitioner's principal claim is that the delay between his indictment and trial violated his Sixth Amendment right to a speedy trial, he also suggests (Pet. 7-9) that the district court's June 1987 order granting an "ends of justice" continuance violated his rights under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* Section 3161(h)(8)(A) excludes from speedy trial calculations "[a]ny period of delay resulting from a continuance granted by any judge * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." In this case, the government and petitioner's co-defendant Staffire filed a joint motion for a continuance based on the complexity of the case and the need for additional discovery. Joint Motion for Continuance (June 2, 1987), docket entry 57; Gov't C.A. Br. 29. The district court properly found that a continuance was justified under Section 3161(h)(8)(A). See 18 U.S.C. 3161(h)(8)(B)(ii) (in determining whether to grant an "ends of justice" continuance, the court must consider "[w]hether the case is so * * * complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section"); see also *United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1197 (2d Cir.), cert. denied, 493 U.S. 933 (1989); *United States* v. *Vega*, 860 F.2d 779, 786-787 (7th Cir. 1988); *United States* v. *Lewis*, 759 F.2d 1316, 1352 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States* v. *Bryant*, 726 F.2d 510, 511-512 (9th Cir. 1984). Petitioner offers no basis for supposing that the district court's evaluation of that motion raises a question meriting review by this Court.

Federal Rule of Criminal Procedure 8(b) provides that defendants may be indicted together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions." Reasoning from that rule, the courts have held that persons who are indicted together generally should be tried together, particularly (as in this case) when they are charged with conspiracy. See, *e.g.*, *United States* v. *Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992); *United States* v. *Ellender*, 947 F.2d 748, 754 (5th Cir. 1991); *United States* v. *Stephenson*, 924 F.2d 753, 761 (8th Cir.), certs. denied, 112 S. Ct. 63 and 112 S. Ct. 321 (1991); *United States* v. *Cross*, 928 F.2d 1030, 1037 (11th Cir.), certs. denied, 112 S. Ct. 594 (1991) and 112 S. Ct. 941 (1992).

Although joint trials are favored, district courts retain authority under Federal Rule of Criminal Procedure 14 to sever trials "[i]f it appears that a defendant or the government is prejudiced by a joinder of * * * [defendants] for trial together." As this Court has recognized, however, the decision whether to grant a severance is a matter within the district court's discretion, and the court's disposition of a motion for a severance is reviewable only for an abuse of discretion. See *United States* v. *Lane*, 474 U.S. 438, 449-450 n.12 (1986). Hence, it is well settled that a defendant is not entitled to a severance merely because he would have had a better chance of being acquitted in a separate trial. See, *e.g.*, *United States* v. *Martinez*, 922 F.2d 914, 922 (1st Cir. 1991); *United States* v. *Warner*, 955 F.2d 441, 447 (6th Cir. 1992); *United States* v. *Manner*, 887 F.2d 317, 324 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990). Rather, because Rules 8 and 14 are designed to secure the advantages of joinder "where the[y] * * * can be achieved without substantial prejudice to the right of the

defendants to a fair trial," *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968), a defendant may obtain relief from the trial court's refusal to sever a joint trial only if he can show that the joint proceeding denied him a fair trial. See, *e.g.*, *United States* v. *Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991); *United States* v. *Featherson*, 949 F.2d 770, 773 (5th Cir. 1991), cert. denied, 112 S. Ct. 1771 (1992); *United States* v. *Leiva*, 959 F.2d 637, 641 (7th Cir. 1992).

In this case, the court of appeals concluded that the district court's refusal to sever petitioner's trial from that of his co-defendant did not deprive petitioner of a fair trial. That determination was plainly correct. Donahue's contention that he was duped by petitioner into piloting the Albatross to Colombia was presented only through the argument of Donahue's counsel, not through the introduction of evidence implicating petitioner. The jury was fully capable of discerning that Donahue's attorney was attempting to exculpate his client by shifting blame for the smuggling venture to petitioner. Moreover, as the court of appeals pointed out, the government presented "overwhelming" evidence that petitioner had directed the smuggling operation and had supervised the other participants in the venture. Pet. App. A31. In light of that evidence, the suggestion by Donahue's counsel that Donahue had acted at petitioner's behest added little to the case against petitioner. Cf. *United States* v. *Lane*, 474 U.S. at 450 (misjoinder under Rule 8 was harmless "[i]n the face of overwhelming evidence of guilt"). Under those circumstances, the court of appeals correctly concluded that any error in the district court's denial of petitioner's severance motion did not require reversal of his conviction.

This Court has granted certiorari in *Zafiro* v. *United States*, 112 S. Ct. 1472 (1992) (No. 91-6824), to consider whether the presentation of antagonistic defenses entitles criminal defendants to separate trials. The Seventh Circuit in *Zafiro* rejected the principle, urged by the defendants in that case, that defendants are entitled to a severance when they raise antagonistic defenses at trial; instead, the court held that a severance is required "only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants." *United States* v. *Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991). In this case, the court of appeals stated the rule sought by the petitioners in *Zafiro*, that "[s]everance is mandated if a co-defendant's defense is antagonistic and mutually exclusive," Pet. App. A29, but concluded that the district court's refusal to grant petitioner a separate trial based on the presentation by Donahue's counsel of an antagonistic defense did not require reversal of petitioner's conviction because of the absence of "compelling prejudice." Pet. App. A31. Thus, even if this Court concludes in *Zafiro* that defendants who present antagonistic defenses are entitled to a severance, it would be unlikely to reverse the judgment of the court of appeals in this case.[8] Nevertheless, because a decision in favor of the petitioners in *Zafiro*

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[8] Petitioner has done little to identify precisely what he found objectionable about the statements of Donahue's counsel at trial. See Pet. 20-21 (stating that the closing argument "incriminated Petitioner at every opportunity," but not identifying any particular statement as prejudicial). The court of appeals' opinion did not identify any particularly prejudicial statement. See Pet. App. A25-A26, A31, A34-A35. Petitioner did not brief the issue in the court of appeals, but simply adopted the arguments made by his co-defendant Staffire, see Gov't C.A. Br. 71.

might undermine the conclusion of the court of appeals that the antagonistic defenses arguably presented at trial were not sufficiently prejudicial to justify reversal of the conviction, the Court may wish to hold the petition pending resolution of *Zafiro*.

3. Petitioner also contends (Pet. 25-30) that the district court erred in failing to conduct a hearing on his motions to suppress evidence seized during the search of his house. That claim does not warrant review by this Court.

Under *Franks* v. *Delaware*, 438 U.S. 154 (1978), a district court must hold a hearing whenever a defendant makes a "substantial preliminary showing" of intentional or reckless inclusion of false statements by the affiant in a warrant affidavit if the allegedly false statements were necessary to the finding of probable cause. *Id.* at 155-156. The Court made clear in *Franks*, however, that there is a "presumption of validity" with respect to the affidavit supporting a search warrant. *Id.* at 171. Moreover, because the district court's task in sifting through the materials submitted by a defendant in support of a *Franks* claim and weighing the possible inferences those materials raises "involve[s] essentially the same process as fact-finding," reviewing courts accord deference to the district court's determination whether a *Franks* hearing is required. See *United States* v. *Pace*, 898 F.2d 1218, 1227 (7th Cir.), certs. denied, 497 U.S. 1030 and 498 U.S. 878 (1990). Petitioner has proffered nothing to suggest that the court of appeals erred in upholding the district court's decision not to hold a hearing.

Petitioner notes (Pet. 25) that one of his suppression motions alleged that the search warrant affidavit contained material misrepresentations and omissions, but

he does not identify the alleged inaccuracies in the affidavit or offer any explanation for his claim that he had made the "substantial preliminary showing" required to obtain an evidentiary hearing under *Franks*. There is no reason for this Court to revisit the district court's determination that petitioner failed to make the requisite showing to warrant a *Franks* hearing.

Petitioner also "presumes" (Pet. 28 n.12) that the district court's denial of his *Franks* motion without a hearing was based upon a mistaken application of the "good-faith" exception to the exclusionary rule set forth in *United States* v. *Leon*, 468 U.S. 897 (1984).[9] As petitioner acknowledges, however (see Pet. 28 n.12), the court did not expressly justify its ruling on that ground. Petitioner's only support for his interpretation of the district court's ruling is an exchange on the first day of trial in which the court questioned petitioner's counsel about the application of the good-faith exception, on which the government relied with respect to petitioner's claim that the warrant was inadequate on its face. See Answer to Motion to Suppress 8-9. It is much more plausible to interpret the court's comments as addressed to the adequacy of the warrant than to the *Franks* issue. There is certainly no basis to suppose that the court's rejection of petitioner's suppression motion on a later date rested on a theory (not advanced by the government) that the good-faith exception would validate a search based on a warrant secured in violation of *Franks*.

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[9] The Court stated in *Leon* that despite its adoption of the good-faith exception, "[s]uppression * * * remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." 468 U.S. at 923.

Nor is there any support for petitioner's assertion (Pet. 25-26) that the district court was required to conduct an evidentiary hearing on his claims that the evidence should have been suppressed because the warrant affidavit was insufficient to establish probable cause and contained stale information and unreliable hearsay, and that the scope of the search exceeded that authorized by the warrant. Petitioner merely recites those contentions without explanation or argument and he fails to identify any evidence the district court could have received at a hearing that would have supported his claims. In sum, petitioner suggests no persuasive reason for this Court to disturb the determination of the court below that petitioner's suppression motions properly were denied without an evidentiary hearing.[10]

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[10] Petitioner also contends (Pet. 30-33) that the court of appeals should have reversed his conviction based on "cumulative error committed before and during trial." Petitioner lists a number of claims that he raised in the court of appeals and asserts (Pet. 33) that the court "could not have considered the cumulative effect of each error to determine whether, viewing the trial as a whole, Petitioner received a fair trial." Contrary to petitioner's suggestion, however, the court of appeals specifically stated that it was "convinced that [petitioner] received a fair trial" and that it had "carefully examined" petitioner's claims and found them to be "without merit." Pet. App. A31, A36. Petitioner offers no substantial basis for further review of those claims by this Court.

CONCLUSION

With respect to the second question presented, the petition should be held for *Zafiro* v. *United States*, No. 91-6824, and disposed of in accordance with the decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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DECEMBER 1992